No. (1)

In The 05 40 JUL 1 2005
Supreme Court of the United States

MARTHA MCSALLY, LT. COL.,
Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas S. Neuberger
Stephen J. Neuberger
THE NEUBERGER FIRM
Two East Seventh Street
Suite 302
Wilmington, DE 19801
(302) 655-0582

Cousel of Record for Petitioner

Randall M. Shaheen
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5734

John W. Whitehead
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
(434) 978-3888

Co-Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

May a plaintiff in a §1983 civil rights action challenging a military policy that required servicewomen to wear an abaya, an Islamic religious head covering, as a violation of servicewomen's religious freedom, recover reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1988, where, as a direct result of plaintiff's lawsuit, Congress enacted legislation forcing an otherwise unyielding executive agency to involuntarily revoke an illegal policy?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia are listed in the caption to this Petition.

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OPINIONS BELOW

The judgment for which review is sought is reported in electronic form as *McSally v. Rumsfeld*, 2005 U.S. App. LEXIS 5679 (D.C. Cir. April 8, 2005), and is set forth in the Appendix beginning at A-1. The judgment of the United States District Court for the District of Columbia is not reported and is set forth in the Appendix beginning at A-3.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States District Court for the District of Columbia, which is the subject of the instant Petition, was entered on April 8, 2005. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976) provides in its relevant part:

> (b) ATTORNEY'S FEES- In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

The National Defense Authorization Act for Fiscal Year 2003, Pub.L. No. 107-314, § 563 (Dec. 2, 2002) provides:

> WEAR OF ABAYAS BY FEMALE MEMBERS OF THE ARMED FORCES IN SAUDI ARABIA
>
> (a) PROHIBITION RELATING TO WEAR OF ABAYAS- No member of the Armed Forces having authority over a member of the Armed Forces and no officer or employee of the United States having authority over a member of the Armed Forces may require or encourage that member to wear the abaya garment or any part of the abaya garment while the member is in the Kingdom of Saudi Arabia pursuant to a permanent change of station or orders for temporary duty.
> (b) INSTRUCTION- (1) The Secretary of Defense shall provide each female member of the Armed Forces ordered to a permanent change of station or temporary duty in the Kingdom of Saudi Arabia with instruction regarding the prohibition in subsection (a). Such instruction shall be

provided immediately upon or not more than 48 hours prior to the arrival of the member at a United States military installation within the Kingdom of Saudi Arabia. The instruction shall be presented orally and in writing. The written instruction shall include the full text of this section. (2) In carrying out paragraph (1), the Secretary shall act through the Commander in Chief, United States Central Command and Joint Task Force Southwest Asia, and the commanders of the Army, Navy, Air Force, and Marine Corps components of the United States Central Command and Joint Task Force Southwest Asia.

(c) PROHIBITION ON USE OF FUNDS FOR PROCUREMENT OF ABAYAS- Funds appropriated or otherwise made available to the Department of Defense may not be used to procure abayas for regular or routine issuance to members of the Armed Forces serving in the Kingdom of Saudi Arabia or for any personnel of contractors accompanying the Armed Forces in the Kingdom of Saudi Arabia in the performance of contracts entered into by the United States with such contractors

STATEMENT OF THE CASE

This petition presents a novel question of exceptional importance arising from the Supreme Court's holding in *Buckhannon Board and Care Home, Inc. v. West Virginia*

Department of Health and Human Resources, 532 U.S. 598 (2001): whether a plaintiff in a §1983 civil rights action can recover reasonable attorney's fees and costs pursuant to 42 U.S.C. §1988, where as a direct result of plaintiff's lawsuit, Congress drafted and passed legislation, forcing an otherwise unyielding executive agency to involuntarily revoke an illegal policy?

The District Court reluctantly answered no and professed itself bound by this Court's ruling in *Buckhannon* (A-4). The United States Court of Appeals for the District of Columbia Circuit summarily affirmed that decision (A-1), and in so doing disregarded the purpose and overarching aims of *Buckhannon*. The Court of Appeals instead applied an interpretation of *Buckhannon* of unprecedented breadth, imposing a rule born of a factually specific circumstance to the case at bar which is wholly distinguishable on the facts. As a result, the Court of Appeals inappropriately applied *Buckhannon*'s bar on the award of attorney's fees to plaintiffs whose claims for fees arise under the "catalyst theory"[1] to a plaintiff whose claim does not.

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[1] The "catalyst theory" has historically been used to provide relief under The Civil Rights Attorney's Fees Award Act of 1976 and is based on the argument that the plaintiff is a "prevailing party" if it achieves a voluntary change in the defendant's behavior. *See Buckhannon*, 532 U.S. at 601. This theory was contemplated by Congress during the drafting of the Act, but has since been overruled by the Supreme Court. *See* H.R. Rep. 94-1558, at 7 (stating:

> A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might *voluntarily* cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief; such as an injunction, is needed.

(emphasis added) (citations omitted)); *but see Buckhannon*, 532 U.S. at 600 (holding that a plaintiff who has not secured

Lt. Col. McSally's claim is distinguishable from the claim in *Buckhannon* for a number of reasons. First, the Department of Defense ("DoD") did not change its own policy. On the contrary, the DoD fought for seven years to maintain the policy, despite the policy's obvious infringement on First Amendment free speech and blatant gender discrimination. Second, Lt. Col. McSally's case was rendered moot by a third party, not by the defendant. Third, whereas in *Buckhannon* the change in defendant's behavior was voluntary (i.e., the West Virginia legislature willingly altered its own flawed law), in this case, the United States Congress intervened to bring an end to the DoD's unconstitutional policies, a full seven years after the DoD first ignored Lt. Col. McSally's pleas. These distinguishing facts, inter alia, clearly remove *McSally v. Rumsfeld* from the narrow confines of *Buckhannon*.

The D.C. Circuit Court of Appeals has not been alone in its misinterpretation of *Buckhannon*. There is discord among the circuits regarding the appropriate interpretation and application of *Buckhannon*. *See Palmetto Props., Inc. v. County of Dupage*, 375 F.3d 542, 551 (7th Cir. 2004) (plaintiff was entitled to attorney's fees where no final judgment entered because county involuntarily changed its policy after adverse ruling on a summary judgment motion); *Tyler v. O'Neil*, 2004 WL 2297148 (3rd Cir. 2004) (defining "prevailing party" to apply to a plaintiff when "some of the benefit sought" by the litigation is achieved whether judicially obtained or not); *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003) (holding that a final judgment or consent decree is not an exhaustive list of possibilities that could satisfy the prevailing party

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judgment on the merits, but has caused a *voluntary* change in defendant's behavior, is not a prevailing party (emphasis added)).

standard); *Truesdell v. Philadelphia Hous. Auth.* 290 F.3d 159, 164 (3d Cir. 2002); *but see Smyth v. Rivero*, 282 F.3d 268, 284 (4th Cir. 2002) (holding an injunction granted to plaintiff did not suffice to meet prevailing party standard under *Buckhannon*). The holding of *Buckhannon* has been used in various and often contradictory manners.

Review by this Court is required to resolve the uncertainty created by these conflicting decisions. The federal courts are divided over the appropriate interpretation and application of a case of great importance. The practical implications for civil rights plaintiffs nationwide are grave should the reading of *Buckhannon* by the D.C. Circuit be allowed to stand. The D.C. Circuit's decision fundamentally misconstrues *Buckhannon* and threatens to abrogate The Civil Rights Attorney's Fees Awards Act of 1976 as Congress intended it. *See* H.R. Rep. 94-1558 (1976); *see also* S. Rep. 94-1011 (1976).

1. *The Abaya Policy.* Female military personnel stationed in the Kingdom of Saudi Arabia have been subject to certain dress and conduct regulations since as early as 1995. These regulations were issued under the authority of the Commander of the 363rd Air Expeditionary Wing and designated as 363 AEW INSTRUCTION 36-103 and were punishable under Article 92 of the Uniform Code of Military Justice. AEW Instruction 36-103. This policy applied solely to female members of the United States military stationed in the Kingdom of Saudi Arabia and governed, *inter alia*, their off-base conduct and attire. *See* 363 Air Expeditionary Wing Instruction 36-103, Colonel R.H. Haseloff, United States Air Force, at 3.12.3.1 (Aug. 7, 2001) [hereinafter, AEW Instruction 36-103]. The policy was published as a formal Air Force instruction and ordered in paragraphs 3.12.3 and 3.12.3.1: "[w]omen will. . . Wear an abaya. The head cover or scarf will be carried at all times and immediately worn if host nation people request it. Units should purchase abayas

through contracting using AF Form 9 procedures." *Id.* at 3.12.3, 3.12.3.1. The regulations specifically required that all female supervisors wear an abaya when traveling off-base.

Moreover, the Instruction instituted a policy requiring that each woman have at least one male escort when traveling off-base, without consideration of rank or the order's adverse impact on her ability to perform her duties, and dictated that no servicewoman drive a vehicle. *Id.* at 3.12.3.5, 4.4. Women were likewise required to, "[r]ide in the rear seat when there were more than two people traveling in the vehicle." *Id.* at 3.12.3.4. The Abaya Policy and the various discriminatory instructions set forth in AEW Instruction 36-103 were implemented without regard to the religious beliefs of the servicewomen, their impact on the ability of the women to perform their jobs, comfort in the oppressive Saudi heat, the denigrating effect on women in general, and without sound rationale.

An abaya is a religious garment characteristically worn by Muslim women in obedience to the Prophet's reply to A'isha as recorded in the Koran. The Prophet ordained: "When a woman reaches puberty no part of her body should remain uncovered except her face and the hand to the wrist joint." (A-12). The abaya is religious in nature and was unconstitutionally forced upon the women of the U. S. military by the DoD. Wearing the abaya is an outward expression of belief in the Muslim faith. It is symbolic speech and was forced upon the women of the United States military by the DoD.

The Abaya Policy applied only to female members of the United States armed services in the Kingdom of Saudi Arabia (A-13). No other woman employed by the United States government was required to wear the abaya while in Saudi Arabia, on or off of a military base. For example, female employees of the U.S. State Department were not

required to wear the abaya, nor were civilian contractors or women working in Saudi Arabia for any of the United States' various agencies and departments. The Abaya Policy was in effect in no other Islamic country. Likewise, the instructions prohibiting females from both leaving base unescorted and driving a vehicle applied only to servicewomen in the Kingdom of Saudi Arabia. The Abaya Policy was unique to the Kingdom of Saudi Arabia, despite the fact that Saudi law did not require foreign women to wear the abaya.

2. *Factual Background.* Lt. Col. Martha McSally is the highest ranking female fighter pilot in the United States Air Force. She is 38 years old and a graduate of the United States Air Force Academy, where she ranked 25th in a class of 1050 (A-10). Upon graduation, Lt. Col. McSally began a stellar career serving her nation and was promoted to the rank of Major two years ahead of her class, an honor reserved for the top three percent of eligible officers. In 1994, Lt. Col. McSally was awarded a fighter assignment to Kuwait and earned the distinguished honor of becoming the first American woman to fly a combat mission when she flew a sortie into Iraq in an effort to enforce the no-fly zone. Lt. Col. McSally impressively has flown more than 100 combat hours in Iraq on two separate deployments to Kuwait. (A-11). Lt. Col. McSally is a devout Christian (A-15). She is a member of her military base's non-denominational Chapel and has led the women's Bible study, choir, most Chapel religious services and base prayer breakfasts.

It was in 1995 that Lt. Col. McSally first encountered the DoD's Abaya Policy. While in a Kuwaiti theater, she noticed a small poster geared toward enlisted women, which depicted the appropriate manner of dress while off-base in Saudi Arabia. Intrigued, she obtained a formal copy of the policy from the Joint Task Force-Southwest Asia

Headquarters (A-13). It was only then that Lt. Col. McSally learned that while the policy prescribed the abaya as off-base attire for women, military men were forbidden from wearing any type of local customary clothing. *See* AEW Instruction. Spurred by the gender inequities inherent in the Abaya Policy, as well as by her own discomfort as a Christian woman with being made to wear a symbol of the Muslim faith and publicly veil her true identity as a Christian, Lt. Col. McSally began her seven-year crusade to change the policy (A-14).

Sometime after Lt. Col. McSally's first encounter with the Abaya Policy, then-Secretary of Defense William Perry visited Lt. Col. McSally's base in Kuwait. Lt. Col. McSally approached the Secretary and inquired about the policy. She asked him, "Sir, you just came from Saudi Arabia. In your discussions, I was wondering if there was any consideration to treating female American soldiers serving in that country with a little more dignity?" (A-14) During the following year, Lt. Col. McSally followed up the chain of command to ascertain whether any action had come of her raising the issue. None had.

In 1997, Lt. Col. McSally addressed the Defense Advisory Committee on Women in the Services (DACOWITS). She was asked about her experiences as a fighter pilot, and she mentioned the Abaya Policy. DACOWITS was completely unaware of the policy's existence. Over the next several years, Lt. Col. McSally performed an increasing amount of research into the Abaya Policy and, in 1999, assumed a position on Capitol Hill as a legislative fellow. During this time, and until her departure in 2000, Lt. Col. McSally discussed the policy with congressional staffers, resulting in an inquiry into the policy by a Congressman on the International Affairs Committee. He informed Lt. Col. McSally that the policy was not one of the United States State Department, as she had been led to

believe, but was rather the sole creation of the DoD. In actuality, the State Department prohibited female employees from wearing the abaya while on duty because doing so was contrary to their role as representatives of the United States government (A-14, 15).

Lt. Col. McSally immediately called the office of the Secretary of Defense and described the findings of the Congressman's inquiry. The DoD responded by defending the policy, stating that it was an important part of respecting the host nation. In 2000, Major General Victor Renuart, Commander of the Joint Task Force South West Asia (JTF-SWA Commander), approached Lt. Col. McSally about his consideration of her for assignment in Saudi Arabia. She expressed her displeasure with the way servicewomen were treated in Saudi Arabia and informed the Major General that, if chosen for the position, as a Christian her personal religious conviction would prevent her from wearing the Muslim abaya and that she would continue to oppose the policy. She stated that she would never put on the garment and described her efforts over the previous five years to change the policy. Major General Renuart initially told her that there was little he could do with regard to the policy. But upon Lt. Col. McSally informing him that the only place the policy appeared in writing was in a local regulation signed by him, he led her to believe that if assigned to Saudi Arabia she could work from within to change the policy (A-16).

Over the following year, Lt. Col. McSally continued her efforts to change the Muslim Abaya Policy. She had lunch with Secretary Whit Peters, then-Secretary of the Air Force, and discussed the policy with him (A-16). Additionally, upon receiving information notifying her that the Abaya Policy was readily being enforced in Saudi Arabia, Lt. Col. McSally wrote the JTF-SWA Commander in anticipation of her deployment to Saudi Arabia and

reminded him of their earlier conversation and her personal conviction. In response, Lt. Col. McSally received two emails, one from the colonel chief of staff and another from the judge advocate, instructing her that wearing the abaya was an order which she would follow or suffer the consequences of disobedience (A-17).

Upon her arrival in Saudi Arabia, Lt. Col. McSally was met at the airport with an abaya and was forced to wear it in compliance with the order. She then set about to change the policy from within as planned. Approximately one year into her tour of duty, Lt. Col. McSally met with her new commander, Major General Renuart, as well as his colonel judge advocate general and colonel chief of staff. During the meeting, she was criticized for her stance against the policy and was informed that the policy would not change (A-18).

In 2001, Lt. Col. McSally was ordered to the United States to attend a conference. While in the United States, she met with her previous commander to again discuss the Abaya Policy. The meeting yielded no change in the Abaya Policy, and Lt. Col. McSally returned to Saudi Arabia. During her final months there, she delegated the majority of her off-base duties to her male deputy so that she would not have to leave the base and be subjected to the Abaya Policy and AEW Instruction. Despite voicing her desire to not "take a negative hit" in her leadership evaluation as a result of her convictions, she was again chastised for her view and efforts (A-18). In March of the same year, Lt. Col. McSally consented to an interview with USA Today. The interview was quickly published in the national newspaper, which further angered her commanding General. Upon returning to Saudi Arabia after the interview, she was again forced to put on an abaya in the airport to wear during the car ride to the base (A-18, 19). At the base, she was faced with a hostile work environment. In April of 2001, Lt. Col. McSally met

with Major General Dylewski, the new JTF-SWA Commander, and he informed her that he was conducting a review of the policy (A-19).

In Saudi Arabia, Lt. Col. McSally was responsible for Combat Search and Rescue. Lt. Col. McSally was a major participant in a novel exercise the United States completed with the Bahrainis, and this exercise sparked interest in the Saudis in completing a similar exercise with United States command in Saudi Arabia. Lt. Col. McSally's colonel, however, refused to allow her to brief the Saudis in preparation for the exercise, stating that she would probably offend them (A-19). It was also during this time that Lt. Col. McSally began to receive negative oral and written feedback. She was denied the opportunity to perform other briefings, and her officer performance report was sub par. In addition, her supervisor refused to recommend her for squadron command. The absence of the command recommendation in the report of an officer of Lt. Col. McSally's caliber was highly conspicuous and was certain to negatively impact her promotion potential (A-20).

In August of 2001, the Air Operations Center was moved from Eskan Village, Saudi Arabia to the Prince Sultan Air Base in the same country. Lt. Col. McSally was not able to lead the move of her cell to the new location because, pursuant to the DoD's policy regarding the conduct of female military personnel, she was not allowed to drive. She was instead forced to rely on her deputy to maneuver the vehicle. Her inability to appropriately perform her job was the final straw for Lt. Col. McSally. As a result of the DoD's discriminatory policy hindering her ability to perform her duties and the six years of fruitlessly rallying for change from within the military, Lt. Col. McSally decided that litigation was the only viable means of achieving a material change in the DoD's policy (A-20).

3. *Litigation and the Congressional Response.* After seven years of attempting to protect her religious freedom and end blatant gender discrimination in the U.S. military while attempting to shield herself from any career damaging recourse, Lt. Col. McSally filed a complaint December 3, 2001 alleging violation of her religious liberty under the First Amendment and the Religious Freedom Restoration Act and gender discrimination under the Due Process Clause of the Fifth Amendment. In her prayer for relief, Lt. Col. McSally sought an injunction restraining the Secretary, and others under his chain of command, from enforcing Instruction 1.12.3.1, a declaration that the regulation was illegal, and an award of costs and reasonable attorneys' fees. She sought to effect through litigation the policy change that the DoD had evaded for over half a decade.

On February 27, 2002, the Secretary filed the declaration of Major Gen. Gary R. Dylewski, the Commander of the Joint-Task Force-Southwest Asia (JTF-SWA). Major Gen. Dylewski stated that the Abaya Policy had been modified after the start of Lt. Col. McSally's lawsuit. Under the new policy, females were no longer required to wear the Muslim abaya or carry the abaya head scarf when traveling off-base, but it was strongly encouraged. Finally, Lt. Col. McSally had secured conscientious objector status for herself as a religious objector to the wearing of the abaya. With the subtle change in military policy, she could now, under the Uniform Code of Military Justice, legally refuse to wear the abaya. However, this change in the conscientious objector status of Lt. Col. McSally marked the full range of benefit derived from the alteration of the military's policy. The new policy no longer required servicewomen tc wear the abaya but, rather, "strongly encouraged" it. Yet, in the military tradition, there was no practical difference between the new and old policy. A required order and a "strongly

encouraged" directive, for a subordinate in the United States armed forces, are identical in purpose and effect.

The following day, February 28, 2002, the Secretary of Defense filed a Motion to Dismiss the Complaint, arguing that the revised policy "strongly encourag[ing]," but not mandating the wearing of the abaya when traveling off-base, mooted Lt. Col. McSally's claims. This question was fully briefed by the parties and argued before the Court on April 24, 2002.

Lt. Col. McSally then filed an Amended Complaint on May 3, 2002, claiming that the technical change in the language of the Abaya Policy did not constitute a practical change in the policy. Lt Col. McSally contended that in the military, "strongly encourag[ing]" denoted an effective requirement. She argued that "[t]he new regulation is the same policy as before in its purpose and effect."

Finally, on May 14, 2002, after seven years of dedicated effort on the part of Lt. Col. McSally, the United States House of Representatives unanimously approved HR 4714, which amended the pending Joint Defense Authorization Bill, HR 4546. The amendment specifically addressed the DoD's Abaya Policy. The bill prohibited the DoD from requiring or formally urging female military personnel to wear the Muslim abaya and head scarf while stationed in the Kingdom of Saudi Arabia. The bill also proscribed the use of funds appropriated by Congress to the DoD for the purchase of abayas to be issued to servicewomen in Saudi Arabia. Three days later, the Secretary of Defense renewed his motion to dismiss Lt. Col. McSally's Complaint. He again argued that the new policy, which only "strongly encourag[ed]" the wearing of the abaya, rendered Lt. Col. McSally's claim moot. The motion was again fully briefed and argued by both parties.

On June 24, 2002, the United States Senate approved amendment S.S. 3969 by a vote of 93-0. The amendment changed the Department of Defense Authorization Bill by prohibiting the DoD from requiring or formally urging servicewomen serving in Saudi Arabia to wear the abaya. The amendment's language tracked that of legislation drafted by counsel for Lt. Col. McSally as part of their effort to obtain relief from the Abaya Policy for her.

While the renewed Motion to Dismiss was pending, the parties jointly filed a Rule 16.3 Joint Report to the Court on July 31, 2002, stating that both houses of the United States Congress had unanimously passed an amendment to the pending Joint Defense Authorization Bill eliminating the Abaya Policy.

Then, on September 27, 2002, the district court denied the Secretary's Motion to Dismiss Lt. Col. McSally's claim, holding that although Congress had approved language in the Department of Defense appropriation bill which would prohibit the Abaya Policy, that legislation had not yet been enacted. The district court determined that until the legislation was enacted, Lt. Col. McSally's claim under the Religious Freedom Restoration Act could not be dismissed because there was evidence on the record that the DoD's policy of "strongly encourag[ing]" women to wear the abaya when off-base in the Kingdom of Saudi Arabia would still restrain the free exercise of religion. The court also called upon the Secretary to brief his position on attorney's fees once the RFRA claim was resolved (A-6).

On October 15, 2002, the Secretary of Defense filed an Answer to the Amended Complaint. Soon thereafter, Lt. Col. McSally was transferred back to Saudi Arabia in preparation of the April 2003 war in Iraq, despite the Secretary's representations in an earlier mootness briefing

that she was not subject to ever being returned to the Middle East.

On December 2, 2002, President Bush signed into law the amended National Defense Authorization Act for Fiscal Year 2003, which, in one of its most fought for components, forbade the DoD requiring or urging United States servicewomen to wear the Muslim abaya while off-base in Saudi Arabia.

4. *The Dismissal of* McSally v. Rumsfeld *and the Petition for Fees.* Beginning in the spring of 2003, Lt. Col. McSally was in Saudi Arabia fighting the war on terror and was unable to assist with her lawsuit. On July 31, 2003, she submitted to the district court her response to an order to show cause. In her response, she stated that the amendment of the prior general order requiring that female service members wear the Muslim abaya and the unanimous enactment of the amended National Defense Authorization Act for Fiscal Year 2003, both of which directly resulted from her seven-year effort to convince the DoD to change its policy and from the litigation, had resolved her claims. Therefore, she affirmed that she was prepared to dismiss all claims regarding the Abaya Policy, and both her counsel and counsel for the Secretary filed a joint stipulation of dismissal on April 24, 2004 (A-7).

Due to unforeseen health problems and confusion as to whether a final order of judgment was entered, counsel for Petitioner filed their petition for fees pursuant to 42 U.S.C. §1988 on June 21, 2004, 58 days after filing the joint stipulation. The district court deemed the motion to be timely and pointed out that Lt. Col. McSally was the reason for "Congressional action that trumped the military's half-baked response to her suit." (A-4). However, the district court declined to grant the request for attorneys' fees, writing that the situation was indistinguishable from that in

Buckhannon (A-4). On April 8, 2005, the District of Columbia Court of Appeals entered a per curiam order affirming the District Court's judgment. It held that "the term 'prevailing party' does not authorize an award of attorneys' fees when the plaintiff achieves the desired result through legislative - not judicial - action." (A-2).

REASONS FOR GRANTING THE WRIT

This Court should grant review to resolve the conflict among the courts of appeals over the definition of "prevailing party" under the Civil Rights Attorney's Fees Awards Act of 1976 and to make clear that Congress intended that a plaintiff who secures a material and legally enforceable change in the legal relationship between plaintiff and defendant resulting from an involuntary change in the defendant's behavior may recover reasonable costs and attorney's fees under the Act. Resolution of these fundamental issues is crucial to the administration of justice and the fulfillment and furtherance of the purpose of the 1976 Act. *See* The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (2005); *see also* H.R. Rep. 94-1558 (1976); S. Rep. 94-1011 (1976).

I. LT. COL. MCSALLY IS A "PREVAILING PARTY" UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AND IS ENTITLED TO REASONABLE ATTORNEYS' FEES AND COSTS.

The Court of Appeals erred when it declared that Lt. Col. Martha McSally was not a "prevailing party" for the purposes of 42 U.S.C. § 1988 which authorizes, in the court's discretion, fee-shifting in civil rights actions. The legislative history of the Civil Rights Attorney's Fees Awards Act of

1976 demonstrates that Congress intended the phrase "prevailing party" to encompass more than the clear victor at the end of litigation or a party that had obtained a favorable "final judgment following a full trial on the merits." *See* H.R. Rep. No. 94-1558, p. 7. Specifically, "parties may be considered to have prevailed when they vindicate rights. . . without formally obtaining relief." *Id.*

Congress plainly intended a plaintiff such as Lt. Col. McSally to be deemed a "prevailing party" because she took on the role of a "private attorney general"[2] when she challenged the DoD's unconstitutional and discriminatory

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[2] The theory of the "private attorney general" was considered by Congress in the enactment of The Civil Rights Attorney's Fees Awards Act of 1976. *See* S. Rep. 94-1101, at 3 (1976); H.R. Rep. 94-1558, at 6 (1976). The theory is not novel and is best articulated in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). The Senate Report utilizes the theory in its statement on the 1976 Act:

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees--* * *[sic] to encourage individuals injured by racial discrimination to seek judicial relief under Title II. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

S. Rep. 94-1101, at 3. The Report further states, "[t]he idea of the 'private attorney general' is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which 'private attorney general[sic]' play a significant role in enforcing our policies." *Id.*

Abaya Policy. Lt. Col. McSally "play[ed] a significant role in enforcing [the] policies" of the United States and is, therefore, well within the class of plaintiffs contemplated by Congress when it scripted the 1976 Act. S. Rep. 94-1101, at 3. Her lawsuit resulted in landmark legislation in which Congress forced an unwilling executive department to end nearly a decade of illegal activity. Lt. Col. McSally satisfied the requirements of the Act when her litigation caused a legally enforceable involuntary change in the DoD policy and resulted in a material change of the position of both Lt. Col. McSally and the DoD. The Court of Appeals was in error when it relied on *Buckhannon*, a factually distinguishable case concerning a *voluntary* change in the behavior of a defendant, to restrict the award of attorneys' fees to Lt. Col. McSally.

A. *Buckhannon* is Factually Distinguishable from the Instant Action and Does Not Bar Lt. Co. McSally from Recovering Reasonable Attorneys' Fees.

In *Buckhannon*, the Supreme Court determined that a plaintiff who has failed to secure a judgment on the merits or by a court-ordered consent decree, but has nonetheless achieved the result desired by the lawsuit due to a *voluntary change* in the defendant's behavior, is not a "prevailing party." *See Buckhannon*, 532 U.S. at 600. There, the plaintiffs alleged that a requirement of a West Virginia statute violated both the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA). Apparently agreeing, the state legislature took steps to remedy the challenged legislation. As a result of the litigation, the West Virginia legislature enacted two bills eliminating the offensive requirement. The West Virginia legislature was motivated to act by the pending lawsuit and,

without instruction from the judiciary or state executive branch, voluntarily changed the requirement.

The *Buckhannon* Court held:

> A defendant's *voluntary* change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* corresponding alteration in the legal relationship of parties.

Id. at 605 (first emphasis added). In so holding, this Court specifically determined that a *voluntary change* did not rise to the standard of conferring "prevailing party" status on a plaintiff, but the decision is conspicuously silent regarding *involuntary* changes in the behavior of the defendant. The facts of *Buckhannon* did not present this issue, and this Court did not address it.

Buckhannon is altogether distinguishable from the case of Lt. Col. McSally, who had worked to no avail for seven years to effectuate a change in the DoD's Abaya Policy. She protested the Abaya Policy and petitioned the DoD for its formal revocation. Finally, after almost a full decade of infringed constitutional rights, Congress enacted legislation forcing the DoD to end its unconstitutional practices. *See* Pub. L. No. 107-314, §563.

The facts of *Buckhannon* are simply not analogous to this action, and its holding is therefore inapplicable. Lt. Col. McSally's crusade to end a policy of religious and gender discrimination in the United States Air Force came to a successful close when the U.S. Congress, motivated to action

by her seven-year effort and ensuing litigation, forced an unwilling DoD to abandon its denigrating policy. The DoD did not voluntarily change the Muslim Abaya Policy--Congress enacted legislation prohibiting it from continuing the discriminatory imperative. Lt. Col. McSally's lawsuit was mooted when the legislative branch of the U.S. government, in an exercise of its lawmaking power, dictated a policy change in an agency of the executive branch. The policy change was not voluntary, but an example of constitutional checks and balances. This situation is far outside the scope of *Buckhannon* and cannot be judged by its standard.

Understanding that *Buckhannon* specifically overruled the "catalyst theory"--which "posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a *voluntary change* in the defendant's conduct," *Buckhannon*, 532 U.S. at 601 (emphasis added) --Petitioner does not assert the "catalyst theory" in this case. Instead, Petitioner maintains that her litigation was resolved when a third party, the U.S. Congress, prohibited the DoD from further denigrating female service members by way of its Abaya Policy. The DoD did not voluntarily discontinue use of the policy as would be necessary for an argument based on the "catalyst theory". Instead, Lt. Col McSally's lawsuit caused an intervening party to act with legal authority to force the DoD to end its illegal activity.

The facts of this case present a novel question to the Court, and the U.S. Court of Appeals for the District of Columbia Circuit erred in affirming the dismissal of Lt. Col. McSally's fee petition based upon the decision of this Court in *Buckhannon*.

B. Congress Intended that Plaintiffs Situated Such as Lt. Col. McSally be Awarded Attorneys' Fees.

This Court held in *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980), that "[t]he legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Hanrahan*, 446 U.S. at 756-57 (citing H.R. Rep. No. 94-1558, at 7; S. Rep. No. 94-1011, at 5). Similarly, the U.S. House of Representatives made clear its intent regarding the class of plaintiffs able to be deemed a "prevailing party." Representative Drinan, a member of the House Judiciary Committee, wrote:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury.

H.R. Rep. 94-1558, at 7. The Senate articulated an even broader approach. It chose not to employ the language "prevailing party" at all and required only that a plaintiff succeed in the enforcement of his infringed rights. *See* S. Rep. 94-1101, at 4. Senator Tunney of the Senate Judiciary Committee wrote, "[a] party seeking to enforce the rights protected by the statutes covered by S. 2278, *if successful*, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Rep. 94-1101, at 4 (emphasis added) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Moreover, Senator Tunney cited the "private attorney general" theory as the motivating factor for the legislation

and argued for a broad class of "prevailing" plaintiffs. *See id.* He even authorized the award of fees *pendite lite* in the appropriate circumstances. *Id.* at 5.

Lt. Col. McSally is clearly a plaintiff contemplated by both houses in the drafting of The Civil Rights Attorney's Fees Awards Act of 1976. *See* H. R. Rep. 94-1558; S. Rep. 94-1101. The House explicitly announced that in order to be deemed a "prevailing party," the litigant need not have emerged victorious after a "full trial on the merits." *See* H.R. Rep. 94-1558, at 7. The report's author further asserted that the plaintiff could "prevail" for the purposes of the Act even if the case was concluded before a "full evidentiary hearing before a judge or jury." *Id.* The instant action fits squarely within the original intent of the Act.

Lt. Col. McSally's litigation concluded successfully when the United States Congress, acting under Article I of the Constitution, *enacted* legislation prohibiting the DoD from exercising the Abaya Policy and terminating its ability to use congressionally delegated funds to purchase abayas for female service members. *See* Pub. L. No. 107-314, §563. Through her seven-year effort, including the instant litigation, Lt. Col. McSally's First and Fifth Amendment rights were fully vindicated, as were her rights under the Religious Freedom Restoration Act. The trial judge wrote,

> [i]t cannot be doubted or gainsaid that her courageous action in challenging dress and conduct regulations applicable only to women serving in the military in Saudi Arabia resulted first in a modification of those regulations by the military and then in Congressional action forbidding the DoD from requiring or even formally urging servicewomen stationed in Saudi Arabia to wear the abaya.

(A-3). Due to Congress' intervention as a direct result of her efforts, Lt. Col. McSally was able to successfully conclude her lawsuit, despite the absence of a full evidentiary hearing before judge or jury. Notwithstanding the early termination of her suit, the rights she fought for seven years to vindicate were finally protected under legal imprimatur. Thus, she is clearly a "prevailing party" within the terms of the Act.

Finally, it was the original intent of the Act's drafters that it be read to secure fees for a broad group of plaintiffs. The Senate Report focuses largely on making it *easier* for plaintiffs to be awarded attorneys' fees under the Act, not harder.

II. THE COURT OF APPEALS MISCONSTRUED *BUCKHANNON*.

In its summary affirmance of the dismissal of Lt. Col. McSally's petition, the Circuit Court paid special attention to this Court's notation in *Buckhannon* that the term "prevailing party" was a legal term of art used in numerous fee-shifting statutes. (A-2). The Circuit Court specifically stated, "it is clear here that appellant is not a 'prevailing party' as that term has been construed under the law of this circuit. In particular, the term 'prevailing party' does not authorize an award of attorney's fees when the plaintiff achieves the desired result through legislative--not judicial action." (A-2). However, in summarily affirming the decision of the District Court, the Court of Appeals misconstrued and broadly overstated this Court's holding in *Buckhannon*.

The *Buckhannon* Court invalidated the "catalyst theory" because it determined that a voluntary change in defendant's behavior does not carry with it a corresponding alteration in the legal relationship of the parties.

Buckhannon, 532 U.S. at 605. Upon referring to the long line of cases defining the boundaries of the fee-shifting statutes, this Court wrote,

> [t]hese decisions, taken together, establish that enforceable judgments on the merits and court-ordered decrees created the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees.

Buckhannon, 532 U.S. at 604. The focus in *Buckhannon* was not on the type of action concluding the case, but on the presence of a "material alteration of the legal relationship of the parties." *Id.* The Court supplied a non-exhaustive list of examples including, but not limited to, a final judgment or consent decree which would allow a plaintiff to be considered the "prevailing party." But the situations enumerated by the Court were by way of example, and not meant to provide an exhaustive list of circumstances under which a plaintiff may recover attorney's fees. The heart of the *Buckhannon* holding is to require a legally enforceable and material alteration in the position of the parties in order for attorney's fees to be recoverable. There are instances other than those listed in *Buckhannon* that might satisfy this requirement.

The *Buckhannon* Court did not attempt to, nor did it profess to, render judgment on every possible situation that might arise. Additionally, the non-exhaustive list the *Buckhannon* Court provided has been interpreted in various ways. Instances other than a consent decree or an enforceable judgment on the merits have been recognized as sufficient by several other Circuit Courts. In *Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004), the court held that a county's repeal of an adult use ordinance was not voluntary for purposes of the *Buckhannon* case

where the repeal occurred after the court had ruled in favor of the plaintiff on a summary judgment motion, although no final judgment or order was entered on that ruling. The Seventh Circuit held that a final judgment or order was not required to make the plaintiff a prevailing party for purposes of § 1988; the summary judgment ruling had changed the legal relationship of the parties, and to conclude that the plaintiff was not a prevailing party would exalt form over substance. *Id.* at 551.

A legally enforceable settlement agreement was deemed sufficient by the Third and Ninth Circuits. Statements by both the Eleventh and Second Circuits express the view that other possibilities beyond a final judgment or consent decree could satisfy the prevailing party standard. *See Truesdell v. Philadelphia Housing Auth.*, 290 F.3d 159, 164 (3rd Cir. 2002) (determining an enforceable settlement agreement sufficient to entitle plaintiff to "prevailing party" status); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1137 (9th Cir. 2002) (differentiating between a plaintiff serving as a "catalyst of policy change" and a party to a legally enforceable settlement agreement who could sue if the contract was breached); *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 907 (11th Cir. 2003) (holding that a final judgment and consent decree did not exhaust the list of occasions satisfying the "prevailing party" standard); *Roberson v. Giuliani*, 346 F.3d 75, 83 (2nd Cir. 2003) (holding same). Because of this, the D.C. Court of Appeals fundamentally erred when it determined that, despite a material and legally enforceable alteration in policy of the DoD, *Buckhannon* barred the award of attorneys' fees to Lt. Col. McSally because the conclusion of her litigation did not neatly fit into one of the two examples listed by the Court.[3]

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[3] The dissent in *Oil, Chemical and Atomic Workers Union v. Department of Energy*, 288 F.3d 452, 460 (D.C. Cir. 2002) fully addressed the facts before the *Buckhannon* Court and the resultant holding of limited

The central holding of *Buckhannon* is that in order for a plaintiff to meet the "prevailing party" standard without a full trial on the merits, she must succeed in achieving a legally enforceable and "material alteration of the relationship of the parties." *Buckhannon*, 532 U.S. at 604. Lt. Col. McSally has met this standard.

Under *Buckhannon*, a voluntary change in defendant's behavior does not make the plaintiff a "prevailing party" because such a change, without judicial or legislative ratification, is unenforceable. It has no legal weight, and the defendant can easily reverse its position at the dismissal of litigation. The plaintiff is no more legally empowered at the end of the litigation than at its start. However, an *involuntary* change forced upon the defendant by an authority with legal power to do so clearly satisfies the prevailing party standard.

The legislation passed by Congress has clearly provided Lt. Col. McSally with legally enforceable recourse should the DoD revert to its illegal policy. The material alteration in the legal relationship between Lt. Col. McSally and the DoD bears the mark of legislative imprimatur and empowers her to judicially defend her victory should the defendant once again implement the Abaya Policy.

The Court of Appeals thus erred in its construction of *Buckhannon*. The change in DoD policy forced by the legislation arising out of Lt. Col. McSally's litigation possesses the requisite legal imprimatur to confer on her the

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application. *See Oil Chemical and Atomic Workers Int'l Union*, 288 F.3d at 460 (dissenting on grounds that *Buckhannon* "makes clear that the Court did not have the occasion to provide an exhaustive list of the various forms of judicial relief that the plaintiff must obtain in order to be a 'prevailing party.' . . .") (Rogers, C.J., dissenting).

status of "prevailing party." Whether the change is legislative or judicial in nature is of little consequence under the original intent of the 1976 Act. In both instances, there would exist a "corresponding alteration in the legal relationship" between Lt. Col McSally and the DoD. This is all that is required by the *Buckhannon* decision. *See Buckhannon*, 532 U.S. at 604 (stating that the reason enforceable judgments on the merits and ordered consent decrees confer "prevailing party" status on the plaintiff is because they "create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" and that "precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties").

If Lt. Col. McSally's litigation had ended with the DoD voluntarily agreeing to cease its illegal practices, perhaps then the Court of Appeals' decision would be an accurate interpretation of *Buckhannon* and that case might apply to the facts of this case. However, the termination of the Abaya Policy was forced upon the DoD by Congress and was thus not a voluntary action undertaken by the DoD. As a result, the requisite alteration in the legal position of the parties which can be enforced through legal means is present. The Court of Appeals' refusal to find that Lt. Col. McSally is a prevailing party eligible for attorneys' fees under the Act is in error.

CONCLUSION

Buckhannon presented the question "whether [the term 'prevailing party'] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a *voluntary* change in the defendant's conduct." *Id.* at 600 (emphasis added). There, this Court specifically addressed and overturned the "catalyst theory" which argues that a plaintiff is a "prevailing party" for the purposes of the Civil Rights Attorney's Fees Awards Act of 1976 if the plaintiff's lawsuit brought about a *voluntary* change in the defendant's conduct. *Id.* at 601. *Buckhannon* is factually dissimilar to the instant action and did not address whether attorney's fees may be awarded by a court when the plaintiff's litigation resulted in an *involuntary* change in the defendant's conduct and a material alteration in the position of the parties.

As such, *Buckhannon* does not bar an award of attorneys' fees to Lt. Col. Martha McSally. Over the objections of the Secretary of Defense, and in response to Lt. Col. McSally's seven-year efforts, the U.S. Congress unanimously acted to vindicate Lt. Col. McSally's rights by enacting a law prohibiting the DoD's illegal and discriminatory Abaya Policy. *See* Pub. L. No. 107-314, §563. In doing so, Congress forced the DoD to involuntarily change its policy. This in turn provided Lt. Col. McSally with an enforceable legal decree and materially changed her legal relationship with the DoD. All requirements for an award of attorneys' fees under 42 U.S.C. § 1988, therefore, have been satisfied.

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Thomas S. Neuberger
Stephen J. Neuberger
THE NEUBERGER FIRM
Two East Seventh Street
Suite 302
Wilmington, DE 19801
(302) 655-0582
Counsel of Record for Petitioner

Randal M. Shaheen
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5734

John W. Whitehead
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
(434) 978-3888

Co-Counsel for Petitioner

No. _____

In The Supreme Court of the United States

MARTHA MCSALLY, LT. COL.,
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX

Thomas S. Neuberger
Stephen J. Neuberger
THE NEUBERGER FIRM
Two East Seventh Street
Suite 302
Wilmington, DE 19801
(302) 655-0582

Cousel of Record for Petitioner

Randall M. Shaheen
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5734

John W. Whitehead
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
(434) 978-3888

Co-Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 8, 2005

No. 04-5303

Martha McSally, Lt. Col.,
Appellant

v.

Donald H. Rumsfeld, Secretary of Defense,
Appellee

Before: EDWARDS, HENDERSON, and RANDOLPH, *Circuit Judges.*

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted and the District Court's judgment filed July 23, 2004, denying appellant's request for an award of attorneys' fees and costs, be affirmed. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley, 260 U.S. App. D.C. 334, 819 F.2d 294, 297 (D.C. Cir. 1987)* (per curiam).

The issue in this case is whether appellant is entitled to an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act, *42 U.S.C. § 1988*, which authorizes a fee award to the "prevailing party." We hold that she is not.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598, 149 L. Ed. 2d*

855, 121 S. Ct. 1835 (2001), which involved the fee-shifting provisions of the *Fair Housing Amendments Act* and the *Americans with Disabilities Act*, the Supreme Court noted that the term "prevailing party" is a "legal term of art" used in numerous [*2] federal statutes, including § *1988*, and the Court has "interpreted these fee-shifting provisions consistently." *532 U.S. at 603* & n.4. Joining several other circuits that have considered the question, we hold that *Buckhannon* applies to the definition of "prevailing party" under the *Civil Rights Attorney's Fees Awards Act. See, e.g., Richardson v. Miller, 279 F.3d 1, 4-5 (1st Cir. 2002); N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n, 272 F.3d 154, 158 (2d Cir. 2001)* (per curiam).

On the record here, it is clear that appellant is not a "prevailing party" as that term has been construed under the law of this circuit. *See Thomas v. Nat'l Sci. Found., 356 U.S. App. D.C. 222, 330 F.3d 486, 492-94 (D.C. Cir. 2003).* In particular, the term "prevailing party" does not authorize an award of attorneys' fees when the plaintiff achieves the desired result through legislative - not judicial - action. *See Buckhannon, 532 U.S. at 601, 604-06.*

The Clerk is directed to publish this order pursuant to *D.C. Circuit Rule 36.* The Clerk is further directed to withhold issuance [*3] of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.*

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA MCSALLY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	01-2481 (JR)
DONALD RUMSFELD, Secretary of Defense,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

Plaintiff, Lt. Col. Martha McSally, moves pursuant to Rule 54(d)(2)(C) for an order granting her an award of reasonable attorneys' fees and costs as a "prevailing party" pursuant to 42 U.S.C. § 1988. It cannot be doubted or gainsaid that her courageous action in challenging dress and conduct regulations applicable only to women serving in the military in Saudi Arabia resulted first in a modification of those regulations by the military and then in Congressional action forbidding the Defense Department from requiring or even formally urging servicewomen stationed in Saudi Arabia to wear the abaya.

These things happened in late 2002, and this case has languished since then because of stalled negotiations over whether and to what extent plaintiff's counsel should be compensated for their efforts in prosecuting this case. Apparently those discussions came to naught. On April 20, 2004, the parties stipulated that the case would be dismissed pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and plaintiff thereafter filed the instant motion for attorneys' fees.

The defendant resists the motion on the ground, first, that it is untimely. That objection is overruled. The deadline imposed by Rule 54(d)(2)(B) is "[fourteen] days after entry of judgment," but no "judgment" was ever entered in this case. Even if the fourteen days runs from the date of voluntary dismissal, the rule provides adjustment of the deadline by "order of the court," which this memorandum shall be deemed to be.

Defendant's second ground for opposing the motion for attorneys' fees, unfortunately for plaintiff's counsel, is dispositive. It relies upon Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Res., 532 U.S. 598 (2001), which, as defendant correctly points out, instructs that a party must obtain a judicially ordered "material alteration of the legal relationship of the parties" before it may be considered a prevailing party under a statute that permits an award of attorneys fees to a prevailing party. Id. at 604 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989)). Plaintiff was unquestionably the "catalyst" for defendant's adjustment of the regulations and then for Congressional action that trumped the military's half-baked response to her suit. It would be correct, indeed, to say that she was not only the catalyst, but also the most active ingredient. Nevertheless, plaintiff has not shown a way to distinguish or circumvent the rule of Buckhannon, and none occurs to this Court. The motion [40] must be, and it hereby is, **denied.**

JAMES ROBERTSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA MCSALLY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No.
	:	01-2481 (JR)
	:	
DONALD H. RUMSFELD, Secretary Of Defense,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM ORDER

After reviewing the parties' briefs on defendant's renewed motion to dismiss, and after considering matters presented to the Court in a telephone conference on July 30, 2002, it appears that only three issues remain in dispute. The first is whether the defendant's new policy of encouraging (but not requiring) women to wear the abaya in Saudi Arabia moots the plaintiff's claim under the Religious Freedom Restoration Act. The second is whether plaintiff should be permitted to pursue her retaliation claim. The third is attorneys' fees.

The first question appears poised for resolution by Congress, in that the latest version of the National Defense Authorization Act for fiscal year 2003, S. 2514, would prohibit the Armed Forces from requiring and from encouraging the wearing of the abaya, and would prohibit any adverse action, formal or informal, against any member of the Armed Forces for choosing not to wear it in Saudi Arabia. § 554. It does not appear that that has been finally enacted into law, however, and the presence in the record of

the affidavit of a general officer - - to the effect that "strongly encourage" may not be the equivalent of "require" but nevertheless restrains the free exercise of religion - - makes it impossible for me to dismiss plaintiff's RFRA claim as a matter of law.

The second question, relating to plaintiff's retaliation claim, is one that the parties say would be easily resolved if this case could be settled. Unfortunately, it appears that the third question, attorneys' fees, has made settlement impossible. The government's attorneys fee position, based on Buckhannon Board & Care Home, Inc. v. West Virginia Dep't. of Health Res., 532 U.S. 598 (2001), needs to be briefed and argued. As long as plaintiff's RFRA claim is unresolved, however, the attorneys' fee question is premature. It is accordingly

ORDERED that defendant's motion to dismiss [17] is **denied**.

JAMES ROBERTSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA MCSALLY	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	01-2481 (JR)
	)	
DONALD H. RUMSFELD,	)	
	)	
Defendant.	)	
	)	

STIPULATION OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41 (a)(1)(ii), the parties hereby stipulate to dismissal of this action with prejudice, except as to attorney fees and costs.

1. Plaintiff further states that although not yet official she understands that she is about to receive a prestigious assignment and therefore no longer desires to pursue her retaliation claim.

2. Defendant further states that dismissal is otherwise warranted.

Respectfully Submitted,
/s/Randal M. Shaheen by CLW
Randal M. Shaheen, Esq.
D.C. Bar No. 409292
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Thomas Stephen Neuberger, Esq.
Delaware Bar No. 243
Thomas S. Neuberger, P.A.
Attorney and Counsellor at Law
Two East Seventh Street, Suite 302
Wilmington, Delaware 19801-3707
Tel: 302-655-0582
(Cooperating Attorney for the Rutherford Institute)
Counsel for Plaintiff
Lt. Col. Martha McSally

/s/Caroline Lewis Wolverton
PETER D. KEISLER
Assistant Attorney General
ROSCOE C. HOWARD, JR.
United States Attorney for the District of Columbia
VINCENT M. GARVEY
Deputy Branch Director
Caroline Lewis Wolverton, Esq.
Ronald Wiltsie, Esq.
United States Department of Justice

Civil Division
P.O. Box 883
Washington, D.C. 20044
Counsel for Defendant Donald H. Rumsfeld

Dated: April 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARTHA MCSALLY	)
Plaintiff,	)
v.	)
DONALD H. RUMSFELD Secretary of Defense	)
Defendant.	)

AFFIDAVIT OF MARTHA E. MCSALLY

Martha e. McSally, being duly sworn, deposes and states:

1. My name is Martha E. McSally. I am an active duty United States Air Force Officer serving in the grade of lieutenant colonel. I am currently assigned to the 612th Combat Operations Squadron at Davis Monthan Air Force Base, Arizona. I am the flight commander for the Air Operations Center (AOC) Flight within that squadron.

2. I was commissioned in 1988 after completing four years at the United States Air Force Academy. I graduated 25th in my class of 1050, earning Distinguished Graduate honors and a full scholarship to Harvard University's John F. Kennedy School of Government. I attended Harvard full time for two years as a lieutenant, and was awarded a masters of public policy with a concentration in international security in 1990. While studying at Harvard, I served as an intern at NATO political Headquarters in

Brussels, Belgium for two summers, where I earned an Air Force Achievement Medal for my contributions to NATO nuclear and conventional arms control issues and future NATO strategy in the post Cold War era. During my second year at Harvard, I served seven to ten days a month as the youngest action officer in the Joint Staff of the Pentagon. There I contributed to work on the United States positions for the Conventional Forces in Europe Treaty negotiations between NATO and the Warsaw Pact.

3. I attended pilot training in 1990-1991, and chose an assignment as a T-37 instructor pilot upon graduation.

4. In 1994, I earned a fighter assignment and became a combat ready A-10 pilot. I deployed to Kuwait and was the first woman in America to fly a combat mission when I flew my fist sortie into Iraq to support the no-fly zone enforcement. I flew one hundred combat hours in Iraq on two separate deployments to Kuwait.

5. In 1997, I was handpicked to become an A-10 instructor pilot. Also in that year, I was selected for promotion to major two years before my peers, a distinction given to fewer than three percent eligible.

6. In 1999, I was selected as one of only fourteen active duty Air Force personnel for a legislative fellowship on Capitol Hill. I served as a defense and foreign affairs advisor to a United States senator for one year.

7. During 1999, I was promoted to the rank of lieutenant colonel two years early, putting me four years ahead of my peers, a rare endorsement reserved for future leaders.

8. In 2000, I was assigned on a remote tour to Saudi Arabia to become the Director of the Joint Search and

Rescue Center (JRSC), which resides in the Air Operations Center (AOC). The AOC is the large command control center used to run all air operations in the Middle East. I was responsible for planning, training, preparing, and directing execution of missions to rescue downed airman or injured ground personnel in the Middle Eastern theater. This responsibility initially focused on Iraq, but expanded to Afghanistan after September 11, 2001. Although the normal remote tour ends at twelve months, I volunteered to stay in Saudi Arabia an extra month for the mission in Afghanistan. I have over 1900 hours of flying time and a senior pilot rating.

9. I am currently challenging four military regulations in this case, all set forth in 363 AEW Instruction 36-103, entitled Off-Base Travel Program:

Paragraph 1.12.3.1: all servicewomen to wear an abaya and carry an abaya headscarf, putting it on when requested by local nationals;

Paragraph 1.12.3.4: all servicewomen to ride in the back seat of vehicles;

Paragraph 1.12.3.5: all servicewomen to be accompanied by a male companion; and

Paragraph 4.4: no servicewomen permitted to operate a vehicle except in an emergency.

10. The wearing of the abaya by women is a tenet of the Islamic faith. The abaya is a mode of dress imposed upon Saudi women solely for religious reasons under provisions of the Koran which, by text and tradition, requires women to wear a head covering and an overgarment. It is based, at least in part, upon the Prophet's reply to A'isha: "When a woman reaches puberty no part of her body should remain uncovered except her face and the hand up to the wrist joint." Other customs addressed in the challenged

regulations are similarly dictated by principles of the Islamic faith.

11. These regulations apply only to female military personnel. They do not apply to the wives of military personnel stationed in Saudi Arabia. They do not apply to non-military females who visit military installations in Saudi Arabia. They do not apply to other federal employees, such as diplomats or other employees stationed at the United States embassy. Nor do the restrictions on dress apply to servicemen stationed in Saudi Arabia. In fact, males are specifically prohibited from wearing Islamic dress.

12. In 1995, on my initial deployment to Kuwait, I first learned of the policy that required servicewomen to wear the abaya and abaya headscarf when off the installation in Riyadh. I saw a picture in a theater newspaper of a young enlisted woman wearing the abaya and a caption stating this modeled the proper wear of the religious clothing when off base.

13. I obtained a copy of the policy from the Joint Task Force-Southwest Asia Headquarters. The policy was a part of a regulation proscribing dress and personal appearance. It was then that I learned that while women are ordered to wear the Muslim clothing, men were forbidden from wearing local customary clothing. I was told by the Joint Task Force-Southwest Asia Headquarters that the policy had been in effect for a long time, for host nation sensitivities, and that is was a State Department issue that the military could do nothing about. In this and other conversations, no one ever used the term "force protection" or mentioned safety from assault or prevention of terrorist attacks as a reasoning for the policy. Its purpose was to respect the culture of the host nation.

14. I have made many attempts over the past seven years to bring about a change to these policies. My attempts to address the abaya policy began in 1995, five years before I was transferred to Saudi Arabia.

15. I first raised the issue with then Secretary of Defense, William Perry. Secretary Perry visited our base in Kuwait. I told my commander I would like to bring the issue up. I asked Secretary Perry this question: "Sir, you just came from Saudi Arabia. In your discussions, I was wondering if there was any consideration to treating female American soldiers serving in that country with a little bit more dignity?" I followed up the chain of command in the next year to see if anyone was taking a serious look at the issue. I was told they were not, and were simply trying to make the controversy go away.

16. In 1997, I addressed the issue with the Defense Advisory Committee on Women in the Services (DACOWITS) when I was asked to talk to them about my experiences as one of the first female fighter pilots. I informed them of the abaya policy. They were unaware that our female troops were forced to wear the Muslim clothing.

17. Over the next few years, I did more research on the policy. I discovered that the abaya was not mandatory for our troops during Desert Storm. Servicewomen were driving, sitting in the front seat, and wearing American clothes or uniform. So the policy came into being sometime between 1992 and 1994.

18. From November of 1999 to November of 2000, I served on Capitol Hill as a legislative fellow. I talked to many congressional staffers about the policy. All of them were unaware of these policies. A congressman on the International Affairs Committee did an inquiry to the State

Department on the policy. They informed him that it was not their policy, but a Department of Defense policy. Additionally, they informed him that they forbid women from the State Department from wearing the abaya while on official duty, since they are representing the United States government.

19. With this new information, I called the Office of the Secretary of Defense and eventually talked to Alina Romanowski, a Deputy Assistant Secretary of Defense for the Middle East. I asked her about the policy. She defended it as being an important part of respecting the host nation. Her explanation of the policy offered no discussion about terrorist attack prevention or force protection. I asked if she was forced to wear an abaya when she traveled there. She said no, but she chose to put one on a few times when she went shopping. I expressed how humiliating it was for our female troops to be ordered to wear it amongst their male peers, superiors, and subordinates in western clothes or military uniform. She told me that perhaps she would feel different about it if she was stationed over there instead of just visiting, and suggested a need to review the policy.

20. In the summer of 2000, I discussed my research and conviction with the Joint Task Force-Southwest Asia Commander (JTF-SWA Commander), Major General Victor Renuart, as he was considering me for assignment to Saudi Arabia. Over ninety-percent of the 5000 people serving in Saudi Arabia have ninety-day deployments. Key leadership positions are filled with people assigned on a remote one-year tour. Although a great job opportunity, I was immediately concerned about the way servicewomen are treated in Saudi Arabia. As a Christian, it was my personal conviction that I could never put on the Muslim garment. I told JTF-SWA Commander and informed him of my five plus year attempt to influence a change in the abaya policy.

21. Major General Victor Renuart initially told me there was little he could do about the abaya and related policies. I informed him that the only place that the policy appears in writing is a local regulation signed by him. I informed him that the State Department did not mandate the abaya. I informed him that military spouses were not required to wear it. I told him I thought it was wrong and it needed to be changed. I told him if he chose me for the job, it was my personal conviction for religious reasons to never wear the outfit. I told him I would continue to urge him to change the policy, and would not leave the base for leisure until it changed.

22. Major General Victor Renuart brought me to the assignment and led me to believe I could possibly influence a change to the policy from the inside. I was unaware of whether my job would require me to leave the base, or how extensively the policy was applied, but I asked him to respect my conviction. He said, "Yes, come on over, I like your straightforward nature, and maybe we can get this policy changed." I was relieved that I would not have to wear the abaya to do my job, and believing I could finally impact a change to the policy from the inside.

23. Shortly thereafter, I asked then Secretary of the Air Force, Whit Peters, about the policy at a lunch. He was unaware that the State Department and military policies were inconsistent. I followed up with a three-page memorandum sent to him through my chain of command. We had subsequent discussions where he said he was doing what he could to address the issue. This attempt to change the policy was also unsuccessful.

24. Three day prior to my departure to Saudi Arabia, I received an e-mail from a chaplain friend deployed to Prince Sultan Air Base. (The Air Operations Center was initially located at Eskan Village. In August of 2001, we

moved to Prince Sultan Air Base.) Eskan Village does not have a runway, so all troops stationed there fly into Prince Sultan Air Base, and travel by car to Eskan Village. My friend was very aware of my long-standing conviction on this issue and was troubled by it himself. He warned me that I was required to wear the abaya and sit in the back seat of the car as soon as I got off the plane for the ride to Eskan Village. I e-mailed over to the Chief of Staff for the JTF-SWA Commander, reminding him of my earlier conversation with the General and my personal conviction I asked him to respect.

25. Two day prior to my departure, I received a response from the colonel chief of staff and a separate response from the judge advocate. Both e-mails stated that wearing the abaya was an order, and that I would follow it or suffer the punishment for disobeying an order. The USS Cole attack had just occurred, and for the first time, the abaya policy was connected to safety in their defense of it. They told me I would not want to endanger the lives of the enlisted troops driving me over my "crusade."

26. I landed at Prince Sultan Air Base in the middle of the night. We were briefed that, due to Saudi customs, women needed to sit in the back seat of the vehicle and wear the abaya. I followed the order.

27. Subsequently, I sent Major General Renuart a point paper recommending an immediate modification of the policy. Now that I had practical data, I recommended he make the abaya not mandatory while traveling in a vehicle between Prince Sultan Air Base and Eskan Village, traveling to and from the international airport, and traveling to the Saudi Air Force Headquarters for official business. In that case, women were forced to wear the abaya over their military uniform.

28. In December 2000, one month into my twelve-month tour, I met with my new commander, Major General Renuart. Major General Renuart brought his colonel judge advocate general and colonel chief of staff in the room. In that meeting, I was criticized about my feelings on this policy. I was told that the policy would not change. The general said he thought the cost outweighed the gain and that he could not change the policy without higher-level government support.

29. In January 2001, the general ordered me to go back to the United States for a conference. While in the United States, I met with my previous commander who had encouraged me to wear the abaya and try to change the policy from within the military chain of command. He gave no indication that he had done anything since our last meeting, and made general comments about continuing to pursue it. I went back to Saudi, and wore the abaya through the airport and in the back seat of the car again.

30. I spent another two months in Saudi with no hope for change. My supervisor began challenging me on my decisions to delegate off-base duties to my male deputy. He told me it was a "leadership" issue for me to not go. I explained it was not right to put me in a position to take a negative hit on my leadership because of my conviction. He refused to see the merits of my argument. He criticized me for my views on the issue. He stated that the issue was not about American values; the issue was about following an order.

31. In March 2001, while in the United States, I was interviewed by a reporter for USA Today. The reporter heard about my story on this issue form people on Capitol Hill. After this interview, I was informed by the colonel that the general was very angry with me. I responded that I informed my chain of command as required. The article

came out on the front page of USA Today three weeks later, the day I was flying back to Saudi.

32. I was greeted at the airport by my supervisor and another lieutenant colonel. He handed me a bag with abaya and abaya headscarf in it and ordered me to put it on. I did so. From that point on, my work environment was hostile. The next morning, I was severely criticized by the colonel for the interview and my stand against the policies at issue.

33. On April 26, 2001, I met with Major General Gary Dylewski, the new JTF-SWA Commander. He stated he was conducting a review of the policy.

34. In Saudi Arabia, I was responsible for Combat Search and Rescue. After we conducted an unprecedented exercise with the Bahrainis, the Saudis became interested in exercising with us for the first time. The colonel refused to let me give the briefing, stating that I would probably offend them.

35. I was then scheduled for my periodic formal feedback session with my supervisor. This session was the first time I had received negative oral and written feedback. My loyalty was questioned and my professionalism and leadership were severely criticized.

36. Soon thereafter, Saudi officers were scheduled to tour the Air Operations Center. Each division director was responsible for standing in their area and briefing their responsibilities. I was told by my supervisor that I could not do the briefing. Instead, my male deputy was told to give the briefing. I challenged this decision. On the outside, the military spokespeople were saying I was not being punished since I did nothing wrong. Ultimately, the decision was reversed and I was allowed to conduct the briefing.

37. In August 2001, my official officer performance report was due. The Air Force has certain unwritten rules for the language that must appear in these reports to advance to higher ranks. For example, in the case of a lieutenant colonel, the last line of a superior's comments must recommend the individual for squadron command. If that command recommendation is missing, it will have a negative impact on advancement, especially for an officer promoted four years ahead of her peers. My supervisor refused to use the word command anywhere in his comments. He told me via e-mail that he left it out specifically because of my choices about the abaya policy addressed in my feedback session.

38. Also that August, the Air Operations Center was moved from Eskan Village to Prince Sultan Air Base. All other directors in similar positions led the effort for their people in the move by driving on several trips at night to move equipment while conducting combat operations in the day. I could not lead my cell in this move since I could not drive, and had to rely on my deputy. Moreover, I declined the option of making several tips with my troops while riding in the back wearing an abaya. As a result of this move, I decided that litigation was the only viable means of changing the policy after six-and-a-half years of trying other means. I told my chain of command I would file a lawsuit two weeks later to give fair notice.

39. Two weeks later was the week of September 11, 2001. I delayed filing due to the nation's tragedy. I focused on my mission for the war the next four months, never leaving the base. We freed the Afghan people from the oppression of the Taliban. We watched the women shedding their abaya-like burqa as a symbol of their new freedom. It was ironic that the female American troops that freed them were still subjected to similar oppression while serving in Saudi.

40. As a practical matter, the tour of duty in Saudi Arabia is a ninety-day deployment. Over ninety-percent of the people assigned in Saudi Arabia are temporary duty, while fewer than ten-percent are there on a permanent change of station. In the military, two different phrases are used to characterize the type of duty in different locations. A move to a new base is referred to using the term "permanent change of station." A move involving a short duty to another base is called a "temporary duty." Temporary duty is usually 179 days or less, while a permanent change of station can be for 180 days or more. However, a permanent change of station does not necessarily mean a permanent reassignment to the new base. Service people are generally stationed in Saudi for a fixed twelve month tour as a permanent change of station.

41. I am now stationed in Tucson, Arizona as a permanent change of station. However, I will have another permanent change of station in the next one-to-three years. I expect that I will go on several temporary duty assignments during my Tucson tour.

42. It is highly likely that I will be sent on a temporary duty back to the Air Operations Center (AOC) in Saudi Arabia during this assignment. I am in a squadron where war time tasking is to be a deployable AOC. Therefore, our personnel are rotating over to the AOC at Prince Sultan Air Base, due to the unique skills and training we possess to fill AOC positions. Recently, a short-notice tasking came to our squadron for a lieutenant colonel with fighter experience. I was one of three people eligible. I could have volunteered to return to Saudi Arabia. However, another person volunteered to go. Due to the fact that all air operations in the Middle East are run from the AOC, we are told to "have our bags packed" and be ready for similar taskings in the near future.

43. In January of 2002, the Department of Defense decided to change the abaya policy from mandatory to "strongly encouraged." The back seat and male escort policies were changed from mandatory to "recommended." These changes are superficial wording changes instead of a substantive change that truly treats our people equally and does not coerce women to wear the abaya. The military is a unique culture where lines of authority must be respected and guidance must be unambiguous. Commanders tell the troops what to do and what not to do in very clear language. Four-star generals do not "encourage;" they order. If they do "strongly encourage," it is simply an order using different terminology. This wording change allows them to attempt to avoid legal oversight, while still coercing female troops to wear the abaya. I have asked hundreds of people of all ranks in uniform what they interpret "strongly encouraged" to mean. Every single person said that it is a veiled order. Even if a person disagrees with the wearing of the abaya, they are disobeying the commander's guidance if they do not do what is "strongly encouraged."

44. Loyalty up the chain of command is a tenet of the military. If a policy is communicated by your superiors, you are responsible for supporting that policy to your subordinates. If I go back over to Saudi, I have the obligation to "strongly encourage" those women below me in the chain of command to wear the abaya. If I do not wear it and encourage it, I will be vulnerable to further retaliation.

I signed this affidavit on 23 day of March, 2002.

Martha E. McSally